(1)

Supreme Court, U.S.
FILED

'03 337 AUG 28 2003

No. ___

IN THE

Supreme Court of the United States

PATRICK ROSSI,

Petitioner,

v.

TROY STATE UNIVERSITY; JACK HAWKINS, Individually and as Chancellor of Troy State University,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ALVIN T. PRESTWOOD *
PRESTWOOD & ASSOCIATES, P.C.
350 Adams Avenue
Post Office Box 1910
Montgomery, Alabama 36102-1910
(334) 264-6401

* Counsel of Record

Attorney for the Appellant

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

48 pp

QUESTIONS PRESENTED FOR REVIEW

1. Has the Court of Appeals decided the issue of the responsibility of proof by the parties under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny in a manner that is contrary to this Court's decisions in such cases as *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) and *Desert Palace, Inc. v. Costa*, __ U.S. __, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003)

2. In its practice of issuing unpublished opinions, as it has done in this case, has the Eleventh Circuit departed from the accepted and usual course of judicial proceedings in such a manner as to call for the exercise this Court's supervisory powers in cases involving the application of the shifting burdens laid down in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny?

PARTIES, PARENT COMPANIES, AND SUBSIDIARIES

In compliance with the provisions of Rule 14.1(b), the Petitioner represents to the Court that Rule 29.6 is not applicable to this case because the Defendants are a public agency and a public official of the State of Alabama. Also, all of the parties to the proceeding are named in the caption of the case.

CITATIONS OF OPINIONS AND ORDERS

The opinion and order of the United States District Court for the Middle District of Alabama is not reported, and is set out at Appendix D. The order of that court denying a rehearing is not reported, but is set out at Appendix C.

The opinion of the Eleventh Circuit Court of Appeals is unpublished, and is set out at Appendix B, and the decision of that Court on rehearing is set out at Appendix A. References to the original order also appear at 64 Fed. Appx. 783, __ F.3d __ (table), and 2003 WL 1701685 (11th Cir. 2003).

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IN THE

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No. ___

PATRICK ROSSI,

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TROY STATE UNIVERSITY; JACK HAWKINS, Individually and as Chancellor of Troy State University,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the United States Court of Appeals for the Eleventh Circuit being reviewed is dated March 18, 2003, and the rehearing and rehearing en banc decision is dated May 30, 2003.

The statutory provision conferring jurisdiction upon this Court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1254(1). Rule 10(a) of the Rules of this Court provides for review of a United States Court of Appeals' decision that has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. Rule 10(c) also provides for

review in this Court of decisions of the Courts of Appeals that have decided important questions of federal law in a way that conflicts with relevant decisions of this Court.

This case involves questions within those standards, because the issues are whether the Court of Appeals has properly applied the rules of the shifting burdens of proof under *McDonnell Douglas Corp. v. Green,* 411 U.S. 972 (1973) and its progeny that are out of step with decisions such as *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and *Desert Palace, Inc. v. Costa*, __ U.S. __, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003)?

STATUTE INVOLVED

42 U.S.C. §2000e-2(a)(1) provides that it is unlawful: to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

The Complaint in this case was brought by Patrick A. Rossi, a faculty member at Troy State University, against the University and its Chancellor, Jack Hawkins. (R1-1). It included a claim for relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., and a claim under 42 U.S.C. §1983. In both instances, the Plaintiff asserted that he had suffered discrimination because of his affiliation with the religious faith of Jehovah's Witnesses. The claim under 42 U.S.C. §1983 involved the Equal Protection Clause of the FOURTEENTH AMENDMENT as

well as association and freedom of exercise provisions of the FIRST AMENDMENT, made applicable to the states through the FOURTEENTH AMENDMENT.

The Defendants served an answer (R1-5), and ultimately filed a motion for summary judgment and a supporting brief (R1-10, 11), to which the Plaintiff responded. (R1-16). The Defendants served a reply to that response (R1-17), and the trial court granted the motion. (R1-19, 20). The Plaintiff then filed a motion under Rule 59, Fed. R. Civ. P., to alter, amend, or vacate the final judgment (R1-21), which motion was denied. (R1-22).

The Plaintiff filed his timely notice of appeal to the Court of Appeals for the Eleventh Circuit on September 30, 2002. (R1-23). The Court of Appeals affirmed the trial court's decision on March 18, 2003, and denied a timely application for rehearing and for rehearing en banc on May 30, 2003.

STATEMENT OF THE FACTS

(a). *Facts acknowledged by the Trial Court.*

Patrick Rossi is, and was at all times relevant to this case, an assistant or associate mathematics professor at Troy State University ("TSU"), and is and was a practicing Jehovah's Witness. (App. 19a). He became an assistant professor in August of 1993, and applied for promotion to associate professor in 1997 after working for four years . (*Id*). That application was denied, but Rossi applied for promotion and tenure in 1997, and was promoted to associate professor and granted tenure in March of 1999. (*Id*).

The mathematics department did not have a permanent "Chair" from 1996 to 2000. Diane Porter, another professor in the department, served as Acting Chair from 1996 to 1998, when Rossi was named Acting Chair by Robert L. Pullen, the Dean of the College of Arts and Sciences. (*Id*). Rossi served as Acting Chair until August 7, 2000, at which time he

resigned from the position, when Chancellor Hawkins sought to appoint a full, or permanent, non-"acting" Chair. (*Id*).[1] Rossi removed himself from consideration because Pullen asked him to do so and because he felt that to seek the permanent post was futile. (App. 19a, 25a).

Based upon the recommendations of Dean Pullen, Chancellor Hawkins appointed Diane Porter as the permanent Chair, and Rossi remained as a full time professor of mathematics. (App. 25a). Diane Porter was an Episcopalian, and not a Jehovah's Witness. (*Id.*).

(b). *Facts asserted by the Plaintiff.*[2]

While the Defendant Hawkins has contended that he had no personal knowledge about the Plaintiff's religious affiliation prior to the filing of the lawsuit, he readily admitted that his actions were "based upon the recommendation of Dean Pullen and the concurrence of Provost [Fred] Davis." Davis, in turn, was aware of the Plaintiff's religious affiliation and, while denying that religion entered into his decision, has admitted that his decision "was based upon the recommendation of Dean [Robert] Pullen." Dean Pullen, on the other hand, had a discussion with the Plaintiff shortly after the Plaintiff was hired in 1993, in which the Plaintiff's religious affiliation was fully discussed and revealed.

The prime actors and the prime contacts that the Plaintiff has had with administrators and faculty regarding his religion have been with Dean Robert Pullen and his wife, Harriett Pullen. The Pullens are active members of the Episcopal Church, and they fully accepted the Plaintiff until they

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[1] The Defendants contended that the position of Chair was not a "permanent" appointment, but the trial court found that dispute to be irrelevant. (App. 25a).

[2] The following facts were submitted by the Plaintiff at the time of the summary judgment submission with appropriate citations to the record. (See R1-16-3 through 5).

learned of his religious affiliation in 1993, shortly after he arrived at TSU. After that time, the Pullens have apparently been resentful of the Plaintiff, and have interfered with the Plaintiff's work. Dean Robert Pullen became Dean of Arts and Sciences in 1996 and, since that time, has had considerable influence over the Plaintiff's career, because the mathematics department is a unit within the College of Arts and Sciences.

The Defendants have contended that the Plaintiff was not qualified to be promoted to Associate Professor in 1997 because he lacked one (1) year of required service for promotion, but the Plaintiff was in fact qualified to *apply* for the position and to have his application approved to be effective at the beginning of the ensuing academic year.

During the times that the Plaintiff applied for the permanent position of Chair of his Department, he was always the better qualified candidate, but his candidacy was rejected. In each case, either Diane Porter was appointed or the position was left open and the search continued for someone who was not a Jehovah's Witness. Diane Porter was not a Jehovah's Witness.

While the Defendants contend that the position of Chair of the Department of Mathematics and Physics is not a "permanent" position, it is routinely designated as such, as opposed to being an "acting" or "interim" position, and persons are recruited with the understanding that it is not a temporary post.

Though Diane Porter was insubordinate in her attempt to work against Rossi while he was serving as Interim Chair, Dean Pullen refused to support Rossi by requiring Porter to be supportive. Diane Porter was recognized by the chair person of a search committee and by Dean Pullen as being "overwhelmed" and ineffective in discharging the duties as Chair of the Department.

When Rossi assumed the position of computer laboratory administrator in the College of Arts and Sciences, he did so with the understanding that he would be given release time for that service, as the computer laboratory administrators were given in other colleges at TSU. Rossi's counterparts in other colleges were not Jehovah's Witnesses, and they were provided release time, while Rossi was not. Rossi was the only person serving in that capacity in the College of Arts and Sciences.

(c). *Jurisdiction of the Court of Appeals.*

The Court of Appeals for the Eleventh Circuit had jurisdiction of this cause in the first instance under 42 U.S.C. §1291 because it involved an appeal from a final decision of a Untied States District Court sitting within its Circuit.

ARGUMENT

The Court of Appeals in this case has recognized, in its unpublished opinion, that Rossi claims religious discrimination because of his Jehovah's Witness membership in that TSU (1) subjected him to a hostile work environment; (2) treated him in a disparate manner by failing to provide him with "release time" as compensation for his services as a computer laboratory administrator; (3) failed to promote him to associate mathematics professor when be first applied in 1997; and (4) failed to promote him to full chair of the mathematics department in 2000. (App. 4a).

The challenged decision also recognized that 42 U.S.C. § 2000e-2(a)(1) made it unlawful for an employer to discriminate against an employee with respect to his "compensation, term, conditions, or privileges of employment" because of his religion. (App. 5a).

In analyzing the three-part burden-shifting framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S.

248 (1981), the Court of Appeals noted that when an employee was required to establish a *prima facie* case of discrimination by indirect evidence, that the employer was required to respond by articulating some legitimate, non-discriminatory reason for its action. When that occurs, the employee was to show that the reason was a pretext for the employer's acts. (App. 5a). In this case, the lower court had held that Rossi had failed to establish a *prima facie* case in support of his first three claims, and that he had failed to show that TSU's reason for not promoting him to full chair of the mathematics department in 2000 was pretextual.

The Court of Appeals disposed of the hostile work environment claim by referring to its *prima facie* case standards laid down in *Miller v. Kenworth of Dothan, Inc.*, 277 F. 3d 1269, 1275 (11th Cir. 2002), and by concluding that Rossi's allegation did "not evidence repeated harassment based on his religion, resulting from an environment that a reasonable person would find to be sufficiently hostile and abusive to alter the terms and conditions of his employment." In so holding, the panel acknowledged that Rossi alleged hat his "supervisory chain" humiliated and embarrassed him because of his religion and sought to cause him to resign, and that Dean Pullen and his wife became resentful and interfered with his work and did not discipline a person who was insubordinate to Rossi. (App. 6a). The totality of this evidence was clearly sufficient to require TSU to respond by tendering its legitimate, nondiscriminatory reasons in accordance with the *McDonnell Douglas* standards. See *Bass v. Board of County Commissioners, Orange County, Fla.*, 256 F. 3d 1095, 1118-1119 (11th Cir. 2001).

Treating Rossi's other claims as presenting issues of disparate treatment, the panel's decision cited *Spivey v. Beverly Enterprises, Inc.*, 196 F. 3d 1309, 1312 (11th Cir. 1999), and noted that his *prima facie* case must include a showing that (1) he was a member of a protected group; (2) he was

qualified for the position or benefit he sought; (3) he suffered an adverse effect on his employment; and (4) he suffered from a differential application of work or disciplinary rules.

Rossi established that persons of other religions at TSU who served as computer laboratory administrators were granted "release time" for their work. The panel disposed of that claim by noting that the comparators were not serving under Dean Pullen in the College of Arts and Sciences, and that the laboratory supervisors in other units at TSU were not shown to have been sufficiently similarly situated to satisfy the requirements noted in *Anderson v. WBMG-42*, 253 F. 3d 561, 564 (11th Cir. 2001). That conclusion was more demanding than logic would contemplate. In *Walton v. Cowin Equipment Co. Inc.*, 774 F. Supp. 1343, 1345 (N.D. Ala. 1991), a district court decried any requirement of "a precise and exact comparison," because "[t]he workplace is very rarely that simple an environment." The panel in this case failed to recognize that fact.

In this case, the comparators and Rossi all held the same identical positions of computer laboratory administrators, but in different colleges or units at TSU. It requires little or no imagination for one to conclude that the duties and activities involved in administering a computer laboratory at a University are likely to be common to all such positions. The Eleventh Circuit, in another setting, has published its rule that "[e]xact correlation is neither likely not necessary, but the cases must be fair *congeners*. In other words, 'apples should be compared to apples.'" *Silvera v. Orange County School Board*, 24 F. 3d 1243, 1259 (11th Cir. 2001) (quoting from and citing *James v. Bessemer Conaway Med. Ctr.* 137 F. 3d 1306, 1311 (11th Cir. 2001) (Emphasis added). The common meaning of the word "congener" is "a person or thing of the same *kind* or *class* as another." See Random House Webster's Unabridged Dictionary, 2nd Ed. (1997). (Emphasis added).

The panel in this case has apparently used the mechanism of an unpublished opinion to avoid adherence to this published precedent.

The final two claims asserted by Rossi involved the failure to promote him to the position of associate professor in 1997 and the failure to promote him to the full chair of the mathematics department in 2000. (App. 8a). The panel decision referred to the precedent of *Denney v. City of Albany*, 247 F. 3d 1172, 1183 (11th Cir. 2001) in holding that a *prima facie* case of failure to promote required an employee to show that (1) he was a member of a protected group; (2) he was not given the promotion; (3) he was qualified for the position; and (4) someone outside of the protected group was given the position.

The challenged decision rejected Rossi's *prima facie* claim regarding the 1997 promotion to associate professor by holding that his application was filed after only four years of service, while promotion itself required five years of such service. Rossi countered that contention by pointing out that others outside his protected class had applied for promotion after only four years and had their applications approved prospectively to be effective at the conclusion of five years of service. (R1-16, pp. 2). The panel decision acknowledged the existence of those contentions, but essentially ignored their impact. (App. 8a).

In the final claim addressed in the panel decision, Rossi asserted that the failure to promote him in 2000 to the position of full chair of the mathematics department at TSU constituted discrimination based on his religion. The panel recognized that the district court had held that Rossi had established a *prima facie* case of discrimination on that claim, but that he had failed to prove that TSU's avowed reason constituted pretext. (App. 8a-9a). That "reason" was the assertion that the selectee, Dianne Porter, was "more successful than Rossi when she performed the duties of acting

chair." (App. 8a). Rossi, however, refuted that assertion by showing that the selecting official had asked him to replace Porter as Interim Chair because "Porter was 'overwhelmed' by the job duties and needed to be replaced." (App. 9a).

Rossi contends that he has presented a *prima facie* case of discrimination in all four of his claims, including the first three of them, for the reasons he has shown. He contends that the panel below should have proceeded to address TSU's asserted reasons for the treatment of Rossi under the first three of the stated claims, and Rossi's claims that they constituted a pretext.

As to the fourth claim of Rossi, the panel decision is incorrect because it does not apply the standard laid down by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). The decision in this case records that Rossi urged the panel to apply the *Reeves* decision since TSU's "reasons" had been placed squarely in issue and there was sufficient evidence to warrant a finding that the employer's asserted justification was false. (App. 8a-9a). The panel decision, however, ignored that standard and proceeded to only address the issue of the disparity of qualifications between two applicants. (App. 9a). Since the only justification asserted was that Porter was more qualified, Rossi's evidence that he was more qualified and that Porter was incapable of performing the tasks should have been presented to a jury under the *Reeves* teaching. Under the shifting of burden framework of the *McDonnell Douglas Corp.* and *Burdine* decisions, the only way that Rossi could refute TSU's asserted justification was to compare the qualifications, as TSU had purportedly done. Rossi was not only submitting evidence of his superior qualifications, but was demonstrating that TSU's sole reason for failing to promote him was false. That comparison was placed clearly in issue by conflicting statements of the selecting official himself. Under *Reeves*, the creation of such an issue, that the

employer's asserted justification is false, is sufficient to require a jury trial in spite of the panel's observation that it required "other discriminatory evidence." (App. 9a).

The Eleventh Circuit has previously addressed the *Reeves* decision in *Hinson v. Clinch County, Georgia Board of Education*, 231 F. 3d 821 (11th Cir. 2000), and *Chapman v. AI Transport*, 229 F. 3d 1012 (11th Cir. 2000) [en banc]). Those cases acknowledged that under *Reeves*, the Court should consider the strength of the employee's *prima facie* case and the probative value of the proof that the employer's explanation is false. When they failed to address those issues, the lower courts committed errors.

The Eleventh Circuit has addressed these and other issues regarding the circumstantial evidence analyses in *McDonnell Douglas Corp.* and its progeny in a flurry of unpublished opinions. In so doing it has continuously and routinely treated employment cases involving only circumstantial evidence as being suspect, even though it has held that "[n]o thumb is to be placeed on either side of the scale" when analyzing evidence in employment cases. *Chapman, supra*, 229 F. 3d at 1026. This Court has emphasized the value of circumstantial evidence in *Desert Palace, Inc. v. Costa*, __ U.S. __, 123 S.Ct. 2148, 156 L.Ed.3d 84 (2003), where it reaffirmed its *Reeves* decision and quoted *Rogers v. Missouri Public R. Co.*, 352 U.S. 500, 508 n.17 (1957) as follows: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Honorable Court should grant this petition and issue its Writ of Certiorari to the United States Court of Appeals requiring it to recognize that the Petitioner has presented a *prima facie* case of discrimination on all of his claims, and

requiring it to remand the cause to the Untied States District Court for the Middle District of Alabama so that a jury trial of the identified issues may be held. In so doing, the Petitioner suggests to the Court that the challenged decision is inconsistent with the holding in *McDonnell Douglas Corp. v. Green, supra*, and it is also inconsistent with the decisions in *Reeves v. Sanderson Plumbing Products, Inc., supra*, and *Desert Palace, Inc. v. Costa, supra.*

The Petitioner also suggests that the challenged decision departs from the accepted and usual course of judicial proceedings in such a manner as to call for the exercise of this Court's supervisory powers.

Respectfully submitted,

ALVIN T. PRESTWOOD *
PRESTWOOD & ASSOCIATES, P.C.
350 Adams Avenue
Post Office Box 1910
Montgomery, Alabama 36102-1910
(334) 264-6401

* Counsel of Record

Attorney for the Appellant

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed May 30, 2003]

No. 02-15455-AA

PATRICK A. ROSSI,
Plaintiff-Appellant,

versus

TROY STATE UNIVERSITY,
JACK HAWKINS, individually and as
Chancellor of Troy State University,
Defendants-Appellees.

ON PETITION(S) FOR REHEARING AND PETITION(S)
FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, _____F.2d_____).

Before: EDMONDSON, *Chief Judge*, ANDERSON and BLACK, *Circuit Judges.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure) , the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
CHIEF JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Mar. 18, 2003]

No. 02-15455
Non-Argument Calender

D. C. Docket No. 01-01319-CV-A-N

PATRICK A. ROSSI,
Plaintiff-Appellant,

versus

TROY STATE UNIVERSITY,
JACK HAWKINS, individually and as
Chancellor of Troy State University,
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama

Before EDMONDSON, *Chief Judge*, ANDERSON and BLACK, *Circuit Judges*.

PER CURIAM:

Plaintiff-Appellant Patrick A. Rossi appeals the district court's grant of summary judgment in his civil rights action, filed pursuant to 42 U.S.C. § 2000(e) *et seq.* ("Title VII") and 42 U.S.C. § 1983, in favor of Troy State University ("Troy State") and Chancellor Jack Hawkins in his official and individual capacities. Rossi contends that the district court erred in finding that no genuine issues of material fact existed

on whether he presented a *prima facie* Title VII claim of religious discrimination and, if so, whether he established that Troy State's proffered legitimate, nondiscriminatory reasons were pretext. No reversible error has been shown; we affirm.

As a preliminary matter, Rossi filed his complaint against both Troy State and Chancellor Hawkins. But the district court dismissed Rossi's Title VII claim against Chancellor Hawkins because Chancellor Hawkins was an individual employee. *See Hinson v. Clinch County Georgia Bd. of Educ.*, 231 F.3d 821,827 (11th Cir. 2000) (relief granted under Title VII is against the employer, not individual employees whose acts constitute violations of the act). The district court also dismissed Rossi's § 1983 claim against Troy State and Chancellor Hawkins in his official capacity based on Eleventh Amendment immunity. *See McClendon v. Georgia Dept. of Community Health*, 261 F.3d 1252, 1256 (11th Cir. 2001) (Eleventh Amendment bars suits against states by states' own citizens).

The district court concluded that the only remaining claims were Rossi's Title VII claim against Troy State and his § 1983 claim for prospective relief against Chancellor Hawkins. Rossi in his brief has not challenged these rulings and, other than correctly contending that claims based on the First Amendment and the Equal Protection Clause may be raised separate from Title VII claims, has not challenged the district court's grant of summary judgment on his § 1983 claim. Accordingly, he has waived review of these issues on appeal. *See Chavis v. Clayton County School Dist.*, 300 F.3d 1288, 1291 n.4 (2002) (a passing reference in appellate's brief is insufficient to raise an issue, and issues not argued on appeal are deemed waived).[1]

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[1] After the district court granted summary judgment, Rossi filed a motion for reconsideration, pursuant to Fed.R.Civ.P. 59. But he also has

The district court's uncontested factual findings include that Patrick Rossi, a practicing member of the religion of Jehovah Witness, was hired by Troy State as an assistant mathematics professor in the College of Arts and Sciences in August 1993. In October 1997, after Rossi completed four years of employment with Troy State, he applied for a promotion to associate professor. His application was denied. Rossi again applied for an associate position in October 1998; this application was granted.

Diane Porter, another professor in Troy State's mathematics department, served as acting chair of the department from 1996 until 1998. Rossi, in turn, served as acting chair from 1998 until August 2000, at which time he resigned his position so that Chancellor Hawkins could appoint a full chair of the mathematics department. Although Rossi initially applied for this full chair position, he subsequently removed himself from consideration. Based upon the recommendation of Dean Robert L. Pullen, the Dean of the College of Arts and Sciences, Chancellor Hawkins appointed Porter to fill the full-chair position. Rossi remains an associate mathematics professor.

Rossi alleged in his complaint that, based on his adherence to the religion of Jehovah Witness, Troy State (1) subjected him to a hostile work environment; (2) treated him in a disparate manner by failing to provide him with "release time" as compensation for his services as a computer laboratory administrator; (3) failed to promote him to associate mathematics professor when he first applied in 1997; and (4) failed to promote him to the full chair of the mathematics department in 2000. Troy State filed a motion for summary judgment; Rossi filed a response and supporting affidavit. The district court granted Troy State's motion. In doing so,

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waived review of the court's denial of this motion; he only refers *to* it in his brief. *See id.*

the district court concluded that Rossi failed to state a *prima facie* case for his first three claims of discrimination and that Rossi failed to show that Troy State's legitimate, non-discriminatory reason for not promoting him to full chair of the mathematics department in 2000 constituted pretext.

Summary judgment is appropriate if there is no genuine issue on a material fact and the moving party is entitled to a judgment as a matter of law. Fed.R.Civ,P. 56; *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986). We review a district court's grant of summary judgment *de novo*, viewing the evidence in the light most favorable to the party opposing the motion. *Coppage v. U.S. Postal Service*, 281 F.3d 1200, 1203 (11th Cir. 2002).

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, term, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Where direct evidence of discrimination is unavailable, a Title VII plaintiff nonetheless may present circumstantial evidence of discrimination sufficient to create a jury question. *Silvera v. Orange County School Bd.*, 244 F.3d 1253, 1258 (11th Cir.), *cert. denied*, 122 S.Ct. 402 (2001). In reviewing Title VII claims that are supported by circumstantial evidence, the plaintiff bears the initial burden of establishing a *prima facie* case of discrimination. *Id.* If the plaintiff is successful the defendant must "articulate some legitimate, nondiscriminatory reason for the [adverse employment action]." *Id.* The plaintiff then may attempt to demonstrate that the proffered reason was, in fact, merely pretext for the defendant's acts. *Id.*[2]

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[2] The Supreme Court set out this three-part burden-shifting framework in *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817, 1824 (1973),

To advance successfully a *prima facie* claim of hostile work environment, a plaintiff must show that (1) he belongs to a protected group; (2) he has been subject to unwelcome harassment; (3) the harassment was based on a protected characteristic; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatory abusive working environment; and (5) the employer was responsible for such environment under either a theory of vicarious or direct liability. *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002). Harassing behavior must result in both an environment that "a reasonable person would find hostile or abusive" and that the victim subjectively perceive[s] . . . to be abusive." *See Harris v. Forklift Systems. Inc.*, 114 S.Ct. 367, 370 (1993) (concluding that Title VII not implicated in case involving a "mere utterance of an epithet"). Although harassment need not be shown to be so extreme that it produces tangible effect on job performance, *see id.* at 371, it is repeated incidents of harassment that continue despite objections that are indicative of a hostile work environment, *see Miller*, 277 F3d at 1276.

Rossi vaguely asserted in his complaint that Troy State's "supervisory chain" humiliated and embarrassed him because of his religion and that it "sought to treat [Rossi] in such a fashion as to cause him to resign." Rossi also contended that Dean Pullen and his wife became resentful and "interfered" with Rossi's work when they learned of his religion in 1993 and that Dean Pullen did not discipline Porter when she was insubordinate to Rossi while he was acting chair of the mathematics department.

Rossi argues on appeal that Troy State's acts "clearly affected" the 'terms, conditions, or privileges" of his employ-

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and *Texas Dept. of Community Affairs v. Burdine*, 101 S.Ct. 1089, 1093 (1981).

ment. As Troy State correctly concedes, Rossi, as a member of Jehovah Witness, belongs to a protected group. But Rossi's conclusory allegations do not evidence repeated harassment based on his religion, resulting in an environment that a reasonable person would find to be sufficiently hostile and abusive to alter the terms and conditions of his employment. Because Rossi failed to support a *prima facie* claim of hostile work environment, the district court did not err in granting Troy State summary judgment. *See id.* at 1275.

To establish a *prima facie* case of disparate treatment, a plaintiff must show that (1) he *is* a member of *a* group protected by Title VII; (2) he was qualified for the position or benefit sought; (3) he suffered an adverse effect on his employment: and (4) he suffered from a differential application of work or discipline rules. *Spivey v. Beverly Enterprises, Inc.*, 196 F.36 1309, 1312 (11th Cir. 1999). Evidence that similarly-situated employees are treated differently is admissible to support a disparate treatment claim when the plaintiff has established that the co-employees are, in fact, similarly situated. *Anderson v. WBMG-42*, 253 F.3d 561,564 (11th Cir. 2001).

Rossi asserted in his complaint and supporting affidavit that professors in other colleges at Troy State were granted release time in exchange for serving as computer-laboratory administrators. In concluding that Rossi failed to state a *prima facie* claim of disparate impact, the district court determined that Rossi did not allege that other similarly-situated persons in the College of Arts and Sciences were given such release time. It concluded that Rossi failed to include the names, dates, or a comparison of duties of the other professors. And it concluded that Dean Pullen, as Dean of the College of Arts and Sciences, would not have granted the other employees release time.

Rossi again argues on appeal that other departments had a pattern and practice of granting release time for laboratory

supervisory work. But, even assuming he can prove all of the other elements for disparate treatment, he has failed to allege that the other laboratory supervisors are, in fact, similarly situated. *See Anderson*, 253 F.3d at 564. Because Rossi failed to allege a differential application of work or discipline rules, the district court did not err in granting Troy State summary judgment. *See Spivey*, 196 F.3d at 1312.

And to establish a *prima facie* case of discriminatory failure to promote, a plaintiff must show that (1) he was a member of a protected group; (2) he was not given the promotion; (3) he was qualified for the position; and (4) someone outside of the protected group was given the position. *Denney v. City of Albany*, 247 F.3d 1172, 1183 (11th Cir. 2001). Rossi asserted in his complaint that Troy State discriminated against him because of his religion by failing to promote him to the position of associate professor in 1997. Although Rossi concedes on appeal that Troy State had a policy not to promote a faculty member before he or she finished five years of employment, he argues that his application should have been considered after four years for prospective promotion after five years. Because Rossi failed to show that he was qualified for being considered for or receiving the position of associate professor in 1997, the district court did not err in granting summary judgment. *See id.*

Even if Rossi did establish a *prima facie* case of failure to promote by showing that he was in a protected group; he was not given the chair of the mathematics department in 2000; he was qualified for the position; and Porter, an Episcopalian, was given the position, the district court did not err in determining that Rossi failed to show that Troy State's legitimate, nondiscriminatory reason for its failure to promote Rossi, that is, Porter was a strong leader who was more successful than Rossi when she performed the duties of acting chair, constituted pretext. Citing to *Reeves v. Sanderson*

Plumbing Products, 120 S.Ct. 2037 (2000), Rossi argues on appeal that he sufficiently challenged Troy States's alleged nondiscriminatory reason and created an issue of fact barring summary judgment. *See id.* at 2109 (a plaintiffs *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated and may be sufficient to withstand a motion for judgment as a matter of law). Rossi contends that he asserted in his affidavit that Dean Pullen and a search committee chairperson asked him to serve as interim chair in 1998 because Porter was "overwhelmed" by the job duties and needed to be replaced.

But a plaintiff may not establish pretext simply by showing that he is more qualified than the person hired; instead. he must adduce evidence that the disparity in qualifications is "so apparent as virtually to jump off the page and slap you in the face." *See Cofield v. Goldkist. Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2081). Because we are "not in the business of adjudging whether employment decisions are prudent or fair," our sole concern *is* "whether unlawful discriminatory animus motivates a challenged employment decision." *See Damon v. Fleming Supermarkets of Florida. Inc.*, 196 F.3d 1354, 1361 (11th Cir. 1999). Even assuming for purposes of appeal that Rossi was more qualified than Porter, Rossi failed to establish that his qualifications exceeded Porter's such that this disparity, in the absence of other discriminatory evidence, created a material issue of fact barring summary judgment.

Because Rossi failed to establish a *prima facie* case of harassment, disparate treatment, or failure to promote relating to his 1997 application and because Rossi did not show that Troy State's legitimate, nondiscriminatory reasons for not promoting him in 2000 were pretext, the district court did not err in granting Troy State summary judgment.

AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Filed Sep. 3, 2002]

CIVIL ACTION NO. 01-A-1319-N

PATRICK A. ROSSI,
Plaintiff,

vs.

TROY STATE UNIVERSITY, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On July 22, 2002 this court issued a Memorandum Opinion, along with a separate Order, granting summary judgment in favor of the Defendants, Troy State University ("TSU") and Jack Hawkins ("Hawkins").[1] This cause is before the court on a Motion to Alter, Amend or Vacate Judgment (Doc. #21) filed by the Plaintiff, Patrick Rossi ("Rossi"). Rossi requests the court revisit its decision in light of deposition testimony not previously considered.

For the reasons to be discussed, the Motion to Alter, Amend or Vacate Judgment is due to be DENIED.

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[1] Jack Hawkins is the Chancellor of Troy State University.

II. FACTS AND PROCEDURAL HISTORY

The facts, as they are relevant to this motion are as follows:

Rossi is a tenured associate mathematics professor at TSU. In his Complaint, Rossi alleged various allegations of religious discrimination pursuant to 42 U.S.C. § 2000e *et seq.* ("Title VII") against TSU and Hawkins. Among those claims was a failure to promote on account of religion. Rossi alleged that TSU did not promote him to the position of Chair of the Mathematics Department because he is a Jehovah's Witness. In the court's Memorandum Opinion dated July 22, the court found that Defendant TSU had given a legitimate non-discriminatory reason for not promoting Rossi. The court further found that Rossi had provided no evidence that TSU's legitimate nondiscriminatory reason was pretext for discrimination. Based upon this, the court granted summary judgment in favor of TSU on the failure to promote claim. Rossi contends that this finding was in error, and now supplements his lack of evidentiary support for pretext with excerpts from a deposition of Dean Robert Pullen ("Dean Pullen" or "Pullen") taken July 10, 2002.

III. DISCUSSION

District courts are necessarily afforded substantial discretion in ruling on motions for reconsideration. *Sussman v. Salem. Saxon & Nielsen*, 153 F.R.D. 689 (M.D. Fla. 1994). Motions for reconsideration generally serve a very narrow function: they are designed solely to correct manifest errors of law or fact or to present newly discovered evidence that could not have been discovered at the time of the original motion. *See* Fed. R. Civ. P. 60. Because "litigants cannot be repeatedly called upon *to* backtrack through the paths of litigation," reconsideration of a previous order is an extraordinary remedy to be employed sparingly. *Sussman*, 153 F.R.D. at 694. Additional facts and arguments that should have been raised in the first instance are not appropriate

grounds for a motion for reconsideration. *Villaflores v. Royal Venture Cruise Lines, Ltd.*, No. 96-2103, 1997 WL 728098, at *2 (M.D. Fla. Nov. 17, 1997), *affd in part, vac'd in part* by *Wilkins v. Commercial Inv. Trust Corp.*, 153 F.3d 1273 (11th Cir. 1998); *see also American Home Assurance Co. v. Glenn Estess & Assocs., Inc.*, 763 F.2d 1237, 1239 (11th Cir. 1992) (considering new arguments post-order affords parties "two bites at the apple"); *Renfro v. City of Emporia, Kan.*, 732 F. Supp. 1116, 1117 (D. Kan. 1990) (noting that a party who fails to present its strongest case in the first instance generally has no right to raise new theories or arguments in a motion for reconsideration).

A. AVAILABILITY OF EVIDENCE

The new deposition testimony submitted by Rossi was available prior to the court's opinion granting summary judgment to TSU, however Plaintiff never submitted any excerpts from the deposition for the court's consideration. The deposition occurred while the Motion for Summary Judgment was pending, however the court did not receive a request by the Plaintiff to supplement his opposition. If the Plaintiff was short of time, this court grants extensions of time freely if a proper request is timely made by a party, however the Plaintiff made no such request in this case. Furthermore, the Plaintiff has offered no explanation for his failure to submit this evidence in a timely manner, or to take the deposition earlier, or to request an extension of time to submit evidence. The Eleventh Circuit has explicitly held that "where a party attempts to introduce previously unsubmitted evidence on a motion to reconsider, the court should not grant the motion absent some showing that the evidence was not available during the tendency of the motion." *Mays v. United States Postal Service*, 122 F.3d 43, 46 (11th Cir. 1997). Accordingly, the court finds that the motion to reconsider on the basis of newly submitted evidence is due to be denied because the Plaintiff failed to submit the evidence prior to the

court's Memoranda Opinion and failed to show good cause why he could not have done so.

Furthermore, the court finds that, even if the new evidence were considered, it would be insufficient to establish that TSU's proffered reason was pretext for discrimination.

B. PRETEXT

The Chair of the Mathematics Department is appointed by the Chancellor. In August of 2000, Chancellor Hawkins appointed Diane Porter ("Porter") and did not consider Rossi for the position. It has been shown by TSU that Hawkins had no knowledge of Rossi's religion. This normally would suffice to preclude liability on TSU's part, however the court determined that it was actually Dean Pullen who selected the name for Hawkins' approval. *See Lubetsky v. Applied Card System, Inc.*, No. 01-17203, 2002 WL 1491654 at *4 (11th Cir. July 12, 2002) (discriminatory failure to promote not actionable if decision-maker unaware of employee's religion). Consequently, the court determined that Pullen was in fact the decision-maker in this case. Pullen stated that he did not choose Rossi for the position, because he "was not a strong leader or administrator" and his "performance was adequate, but was not sufficient to warrant his promotion to Chair." *See* Brief in Support of Summary Judgment, Exh. I, page 2-3. Initially, Rossi offered no evidence to rebut these non-discriminatory reasons. Now Rossi offers deposition excerpts in an attempt to show that Pullen's proffered reasons are untrue and in reality pretext for discrimination.

In the *McDonnell Douglas* burden shifting analysis, after an employer has proffered a legitimate non-discriminatory reason for not promoting the employee, the burden shifts to the Plaintiff to prove that this reason is untrue. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1981). A plaintiff may do so "either directly by persuading the court that a discriminatory reason more likely motivated the

employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *See Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 US. 248, 254 (1981)). In this case, Rossi seeks to discredit Pullen's reasons through the newly offered deposition testimony.

Plaintiff asserts that Dean Pullen stated in his affidavit three areas where Rossi was not a good leader or administrator: 1) scheduling of classes, 2) availability to the students and faculty, and 3) future planning. *See* Motion to Alter, page 2-3. Rossi alleges that Pullen's deposition testimony refutes each of these reasons and that this in turn refutes Pullen's non-discriminatory reason for not promoting Rossi. Id. First, the court finds that these three reasons are stated nowhere in Pullen's affidavit before the court. The court is completely unaware as to their origin. It is inappropriate for Rossi to allege his own nondiscriminatory reasons in place of the employer's reasons and then attempt to refute them. Rossi cannot change Pullen's proffered reasons so that he can create pretext. *See Chapman v. Al Transport*, 229 F.3d 1012, 1030 (11th Cir. 2000) (a plaintiff cannot recast an employer's proffered nondiscriminatory reasons and must attack employer's reasons "head on"). The deposition testimony arguably casts some doubt on whether Rossi was a good scheduler of classes, was available to students or faculty, or adequately planned the future of the mathematics department, however it does not suffice as a direct attack upon Pullen's statements that Rossi "was not a strong leader or administrator" and that his "performance was adequate, but was not sufficient to warrant his promotion to Chair." *See* Brief in Support of Summary Judgment, Exh. I, page 2-3. Therefore, the newly provided evidence is insufficient to establish that Pullen's reasons are pretext. *See Combs*, 106 F.3d at 1538. (to establish pretext, employee must establish "such weaknesses, implausibilities, inconsistencies, incoher-

encies, or contradictions in the employer's *proffered* legitimate reasons for its action that a reasonable fact finder could find them unworthy of credence.").

Furthermore, in what appears to be Rossi's continued attempt to argue that he was better qualified than Diane Porter, Rossi has only submitted marginal evidence that he was a better candidate than Porter. In a discriminatory failure to promote case, Rossi cannot simply show that he was better qualified than Porter to establish pretext; Rossi must "adduce evidence that the disparity in qualifications is 'so apparent as virtually to jump off the page and slap you in the face.'" *Cofield v. Goldkist, Inc.*, 267 F.3d 1264, 1268 (11th Cir. 2001) (quoting *Denney v. City of Albany*, 247 F.3d 1172, 1187 (11th Cir. 2001)). At the very best, the deposition testimony of Pullen provides evidence that Rossi and Porter were about the same. A reasonable fact-tinder could not conclude that the differences in the qualifications of Porter and Rossi were so great as to deduce that Pullen was not telling the truth. See *Cofield*, 267 F.3d at 1268.

As was found in the court's previous opinion, Rossi has produced insufficient evidence for a reasonable jury to conclude that religion played any part in any of the adverse employment decisions alleged. Rossi has attempted to create pretext through the deposition testimony of Pullen, however the court finds that this testimony, even if considered, would be insufficient to establish that Pullen's proffered reasons for not promoting Rossi were in fact pretext for discrimination.

IV. CONCLUSION

For the reasons discussed, it is hereby ORDERED that the Motion to Alter, Amend, or Vacate Judgment (Doc. #21) submitted by the Plaintiff, Patrick A. Rossi, is DENIED.

DONE this 3rd day of September, 2002.

/s/ W. Harold Albritton
W. HAROLD ALBRITTON
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Filed July 22, 2002]

PATRICK A. ROSSI,

Plaintiff,

v.

TROY STATE UNIVERSITY, *et al.*,

Defendants.

MEMORANDUM OPINION

I. INTRODUCTION

This cause is before the court on a Motion for Summary Judgment (Doc. #10) filed by the Defendants Troy State University ("TSU") and Jack Hawkins ("Chancellor Hawkins" or "Hawkins") (collectively "Defendants").[1]

The Plaintiff, Patrick Rossi ("Rossi"), brings claims of religious discrimination pursuant to 42 U S.C. § 2000 *et seq.* ("Title VII") and 42 U.S.C. § 1983 against TSU and Hawkins.

For reasons to be discussed, the Motion for Summary Judgment is due to be GRANTED.

II. SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answer to interrogatories, and admissions on file, together

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[1] Jack Hawkins is the Chancellor of Troy State University.

with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317,322 (1986).

The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323. The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by showing, or pointing out to, the district court, that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. *Id.* 322-24.

Once the moving party has met its burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id* at 324. To avoid summary judgment, the nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus Co. v. Zenilth Radio Corp.*, 475 US. 574, 586 (1986). On the other hand, the evidence of the nonmovant must be believed and all justifiable inferences must be drawn in its favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

After the nonmoving party has responded to the motion for summary judgment, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as matter of law. Fed. R. Civ. P. 56(c).

III. FACTS

The submissions before the court, viewed in the light most favorable to the non-movant, establish the following facts:

Patrick Rossi is an associate mathematics professor at Troy State University. Rossi is also a practicing Jehovah's Witness.

Rossi initially gained employment as an assistant professor in August of 1993. After working for four years, Rossi applied for a promotion to associate professor in October of 1997. This application was denied. Rossi applied again in October of the following year and was promoted and granted tenure in March of 1999.

During this time period, the mathematics department was vacant of an appointed "Chair" Diane Porter, another professor in the mathematics department, served as Acting Chair from 1996 until 1998. In 1998, Rossi was named Acting Chair by the Dean of the Arts and Sciences College, Robert L. Pullen ("Dean Pullen"). Rossi served as Acting Chair until August 7, 2000, at which time he resigned this position. At this time, Chancellor Hawkins sought to appoint the full Chair of the Mathematics Department. Rossi removed himself from consideration. Based upon a recommendation by Dean Pullen, Chancellor Hawkins appointed Diane Porter as the Department Chair. Rossi remains a full time mathematics professor.

IV. DISCUSSION

Rossi brings claims in this case pursuant to Title VII and 42 U.S.C. § 1983 against both Hawkins and TSU. Apparently there is some confusion as to which claims are brought against which Defendant which the court will address at the outset.

From the Complaint, it appears that both Hawkins and TSU are sued under Title VII; however, it is well established m this Circuit that a Title VII action will not lie against an

individual employee. *See Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) ("Individual capacity suits under Title VII are . . . inappropriate"); *Cross v. State of Alabama Dept. of Mental Health & Mental Retardation*, 49 F 3d 1490, 1504 (11th Cir. 1995). Chancellor Hawkins is therefore due to be dismissed from the Title VII claim.

In Count II of the Complaint, there are allegations pursuant to § 1983 against Hawkins in both his individual and official capacity. Since a suit for damages against an individual in his official capacity pursuant to § 1983 is the same as a suit against the entity which the individual represents, the official capacity claim for damages is a claim against TSU. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985). TSU is considered an agency or instrumentality of the state of Alabama and is thus entitled to Eleventh Amendment immunity in federal suits. *See Harden v. Adams*, 760 F.2d 1158, 1163-64 (11th Cir. 1985). Because of this, TSU and Hawkins in his official capacity are due to be dismissed from the § 1983 claim for damages. *See Manders v. Lee*, 285 F.3d 983, 990 (11th Cir. 2002) (state instrumentality or agent entitled to Eleventh Amendment immunity). The claim for prospective injunctive relief against Hawkins, however, is not deemed a claim against the state. *See Cross v. State of Ala. Dept. of Mental Health and Mental Retardation*, 49 F.3d 1490, 1503 (11thCir. 1995). Thus, the Eleventh Amendment does not bar the claim against Hawkins for prospective injunctive relief. *Id.*

Finally, in the Plaintiff's Response to the Motion for Summary Judgment, Plaintiff concedes that the claim for damages against Hawkins in his individual capacity should be dismissed. The court therefore finds that this claim is also due to be dismissed.

Based on these findings, including the Plaintiff's own admissions, the court concludes that the only remaining claims for the court to consider are the Title VII claims

against TSU and the claim for prospective injunctive relief brought under § 1983 against Hawkins in his official capacity.

A. TITLE VII

Although set out vaguely, the Plaintiff apparently is asserting a hostile work environment claim, a failure to promote on the basis of religion, and another disparate treatment claim. As there is no allegation that TSU refused to allow Rossi to practice his religion, the court finds no failure to accommodate claim.

1. Hostile Work Environment

The Complaint does not clearly distinquish between the different claims under Title VII, however the court has considered each of the possible claims. In the Complaint, the Plaintiff argues that "the Plaintiff's supervisory chain has humiliated and embarrassed him because of his adherence to the religion of Jehovah Witness[,]" and 'have sought to treat the Plaintiff in such a fashion as to cause him to resign." See Complaint, ¶¶ 6, 7. Other than these, there are no express allegations contained in the Complaint that the Plaintiff was subjected to a hostile work environment. Despite this lack of a specific allegation, the court will construe these allegations in the Complaint as a hostile work environment claim for the purposes of this motion.

While there are very few reported cases dealing with hostile work environment claims on the basis of religion, the standard of proof under Title VII remains the same regardless of the discrimination alleged. *See Hafford v. Seidner*, 183 F.3d 505, 512 (6th Cir. 1999); *Abramson v. William Patterson College of New Jersey*, 260 F.3d 265, 277 (3rd Cir. 2001).

In order for a Plaintiff to set out a prima facie claim for hostile work environment, the Plaintiff must establish: (1) that he or she belongs to a protected group; (2) that the

employee has been subject to unwelcome harassment; (3) that the harassment was based on the religion of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create an abusive working environment; and (5) a basis for holding the employer liable. *See Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 582 (11th Cir. 2000) (in the sexual harassment context); *see also Hafford*, 183 F.3d at 512 (applying standard to religious discrimination claim). Factors which can be considered are the frequency and severity of the conduct, whether it is physically threatening or humiliating, and to what degree it reasonably interferes with the plaintiffs job performance. *Rojas v. Florida*, 285 F.3d 1339, 1344 (11th Cir. 2002).

Assuming that Rossi can establish the first three prongs of this test, the Plaintiff failed to establish that the conduct alleged was sufficiently severe or pervasive or has altered the terms and conditions of employment. Title VII is violated when the workplace "is permeated with discriminatory intimidation, ridicule, and insult." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). There are no such allegations in this case. Plaintiff asserts that Dean Robert Pullen and his wife, who were initially cordial to Rossi, became resentful after learning of Rossi's religious faith in 1993. Rossi further alleges that the Pullens have "interfered" with his work. The only substantiation of this broad allegation is the Plaintiff's own non-specific affidavit to the EEOC. *See* Complaint, Exhibit 1. Plaintiff also asserts that Diane Porter was insubordinate to him and Dean Pullen did not discipline her. *See* Response to Motion for Summary Judgment, Rossi Affidavit, page 4. There is no allegation that religion played any part in this. Plaintiff presents no other evidence of a hostile working environment outside of conclusory allegations of harassment. *See* Response, page 11 ("he was harassed in his work"). Furthermore, Rossi has worked with or under Pullen for nine years, during which time Pullen recommended Rossi for

tenure and promotion and appointed him as Acting Chair of the mathematics department in 1998. *See* Defendants Exhibits E and I. Rossi has also worked with Diane Porter for the same length of time and has reported no specific instances of hostile behavior, nor any evidence that she was even aware of his religion. These allegations cannot suffice for a hostile working environment claim. And, since Rossi's charges of specific disparate treatment, discussed hereafter, do not survive summary judgment, they do not help the claim of hostile work environment based on religious discrimination. Therefore, the court finds that the Plaintiff cannot sustain a prima facie case of hostile working environment and the Defendant TSU is entitled to summary judgment on this claim.

2. Failure to Promote

Since the Plaintiff has provided no direct evidence of discrimination in this case, the court will employ the burden shifting analysis of *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1981). If a plaintiff can set out a prima facie case of discrimination, then the defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action. *See McDonnell Douglas*, 411 U.S. at 802. If the defendant is able to do so, the plaintiff bears the burden of showing that defendant's proffered reason is merely pretext for discrimination." *See id.* at 804.

In order to establish a prima facie case of discriminatory failure to promote, Rossi must show that (1) he was in a protected group; (2) he was not given the promotion; (3) he was qualified for the position and (4) someone outside of the protected group was given the position. *Standard v. A.B.E.L. Services. Inc.*, 161 F.3d 1318, 1333 (11th Cir. 1998).

Rossi's allegations consist of two separate instances of alleged failure to promote on the part of TSU. The first is where Rossi's application to be promoted to associate

professor was denied in 1997. The second is Rossi's contention that, even though he withdrew his application for the position, he was discriminated against when TSU failed to make him chair of the mathematics department in 2000. Rossi's failure to apply for this position does not bar his claim if he can show that an application would have been a futile gesture. *See Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398,406 (5th Cir. 1999) (citing *Claiborne v. Illinois Cent. R.R.*, 583 F.2d 143, 150 (5th Cir. 1978).[2]

After serving four years as an assistant mathematics professor, Rossi applied for and was denied the position of associate mathematics professor m 1997. Rossi contends that he was not promoted because he is a practicing Jehovah's Witness. This establishes both the first two prongs of the Plaintiff's prima facie case because Rossi did not receive the position and religion is protected by Title VII. *See* 42 U.S.C. § 2000e-2 ("race, color, religion, sex, or national origin"). The third factor is more difficult, however, as the Defendants contest whether Rossi was qualified for this position at the time. Defendants submit irrefuted evidence that a teacher must be employed for five consecutive years before being promoted to associate professor.[3] *See* Defendants' Exhibit B, page 31. Rossi admits that he had only been employed for four years, however argues that "it was customary for persons to apply for promotion" prior to five years. *See* Respondent to Motion for Summary Judgment, Affidavit of Rossi, page 1.

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit issued prior to October 1, 1981.

[3] There is a provision in the guidelines that a teacher could be promoted with only three consecutive years of employment at TSU if the teacher had been employed for a total of five consecutive years including some other accredited University prior to TSU. *See* Defendants Exhibit B, page 31. Rossi has submitted no allegation that he qualified under this provision.

Rossi was allowed to apply for the position, however he was denied because he had not worked the requisite five years. Rossi has not offered any evidence of anyone who applied after four years and was subsequently promoted prior to the time listed in the guidelines. The Plaintiff by his own admission was not qualified for the position at the time of the application. The court thus cannot find that the plaintiff can establish a prima facie case. Furthermore, when Plaintiff applied in the following year, and was qualified, his promotion and tenure were granted, with the strong recommendation of Dean Pullen. *See* Def. Exh. E. Thus, Rossi is attempting to substitute this religious discrimination argument for what is admitted to be a valid reason to withhold promotion. The court finds no basis for this and summary judgment is due to be granted to TSU on this claim.

Plaintiffs other Title VII claim surrounds the position of Chair of the Mathamatics Department. The parties dispute whether this is a permanent position, however the court finds that this is irrelevant for the court's determination of this motion. The position is full time and it certainly constitutes a tangible change in employment status, whether it is monetary or purely more prestigious. A failure to promote to the chair of the department could create a Title VII Claim.

After resigning his position as acting Chair, Rossi claims that he did not reapply for the position of chair of the Mathematics Department at the request of Dean Pullen. *See* Response, Affidavit of Rossi, ¶ 11. Even though Rossi's application was not considered by the chancellor, the court will assume, for the purposes of this motion, that he applied because it is alleged that Rossi wanted the position and Dean Pullen told him to not submit an application. This allows Rossi to still make a prima facie claim of discriminatory failure to promote. Rossi is a member of a protected group, he was qualified for the position, he did not get the position and someone outside of his class, Diane Porter (an Episcopalian), did receive the promotion.

TSU, however, contends that the promotion of Diane Porter was not based on any religious basis. It is agreed that Chancellor Hawkins was not even aware of Rossi's religious affiliation and based his decision on the recommendation of Dean Pullen and the Provost, Fred Davis. *See* Response, page 3, 8; Def. Exh. H. The Eleventh Circuit has recently held that a discriminatory failure to promote or hire is not actionable where the decision-maker is shown to not be aware of the applicant's religion. *See Lubetsky v. Applied Card Sustems, Inc.*, No. 01-17203, 2002 WL 1491654 at 4 (11th Cir. July 12, 2002). Despite this, since Chancellor Hawkins made his decision based only on the applicants recommended by Dean Pullen, the court must consider TSU's liability even though Chancellor Hawkins was not aware of Rossi's religion. It is alleged that Dean Pullen was aware of Rossi's religious affiliation, and did not recommend Rossi for the position, therefore the court will still consider that Rossi can make out a prima facie case.

In his affidavit to the court, Dean Pullen asserts that he did not recommend Rossi because Rossi "was not a strong leader or administrator" during the time he served as Acting Chair of the department and that Diane Porter was deemed more capable based upon the comparative success of her performance in her earlier Service for two years as Acting chair. *See* Def. Exh. I. The Provost concurs in his affidavit. *See* Def. Exh. K. Since this is a legitimate nondiscriminatory reason, the Plaintiff bears the burden of proving that this reason is merely pretext for discrimination. *See Rojas*, 285 F.3d at 1342. The Plaintiff has not satisfied this burden in this case. Rossi has offered no evidence whatsoever that this explanation was merely pretext for religious discrimination. The Plaintiff alleges that Dean Pullen and his wife were aware of Rossi's religion and were not as friendly to him after becoming aware of this fact. Dean Pullen, however, had this knowledge at the time he strongly recommended Rossi for tenure and promotion to associate professor, and also at the

time Rossi was placed in the position of Acting Chair to give him a chance to prove himself as an administrator. (*See* Def. Exh. I). Plaintiff also alleges that the other applicants were less qualified and all members of other religions, however there are no specific allegations or evidence to conclude that Dean Pullen's reason for not promoting Rossi was in fact a "coverup" for religious discrimination. *See Id.* (quoting *McDonnell Douglas*, 411 U.S. at 805). Therefore, the court finds that the Plaintiff has not satisfied his burden in proving pretext and consequently, summary judgment is due to be granted in favor of TSU on this claim.

3. ReleaseTime

Rossi also asserts a disparate treatment claim on the basis that he was not provided release time for services as a computer laboratory administrator as were other administrators at TSU. Dean Pullen submit in his affidavit that it is College of Arts and Sciences policy to not allow release time for these duties. *See* Def. Exh. I, page 1, ¶ 5. Rossi had provided no evidence of any other person in the College of Arts and Sciences who at any time was given release time for similar duties. He states by affidavit that computer laboratory administrators in other colleges at TSU were provided release time, but gives no names, no comparison of duties, and no dates. Futhermore, administrators in other Colleges would not have been given release time by Dean Pullen, the Dean of the College of Arts and Sciences.

The court finds that the Plaintiff has not established a prima facie case of disparate treatment in this case because he has not sufficiently shown that similarly situated persons outside of his protected class were treated differently. Even if the Plaintiff were able to establish a prima facie case, TSU has submitted a legitimate nondiscriminatory reason for the employment action and the Plaintiff has offered no evidence that this reason is a pretext for religious discrimination. Thus, TSU is also entitled to summary judgment on this claim.

B. PROSPECTIVE INJUNCTIVE RELIEF

Plaintiff mentions prospective injunctive relief in his Brief in Opposition to the Motion for Summary Judgment. Prospective injunctive relief asks this court to enjoin a state official from a continuing violation of a federal law. *See Harbert Intern., Inc. v. James*, 157 F.3d 1271, 1278 (11th Cir. 1998). Based upon the Complaint, the court must assume that the Plaintiff contends that Hawkins is violating federal law by discriminating against him on the basis of religion. *See* Complaint, page 5. As the Plaintiff has provided no credible claims of religious discrimination, the court finds no grounds that would support injunctive relief in this case. Therefore, summary judgment is also due to be granted on this claim.

V. CONCLUSION

Rossi obviously strongly considers himself to have been more qualified to serve as Chair of the Mathematics Department than the person placed in that position and has convinced himself that the reason he was not selected must have been that he is a Jehovah's Witness. There is simply insufficient evidence, however, from which a reasonable jury could conclude that such religious discrimination was the reason for this, or any other, adverse employment decision, or that Rossi was subjected to a hostile working environment because of his religion.

For the reasons discussed, the court finds that summary judgment is due to be granted in favor of Troy State University and Jack Hawkins and against Patrick Rossi. A separate order will be entered in accordance with this opinion.

DONE this 22nd dayof July, 2002.

/s/ W. Harold Albritton
W. HAROLD ALBRITTON
CHEF UNITED STATES DISTRICI' JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

[Filed July 22, 2002]

CIVIL ACTION NO. 01-A-1319-N

PATRICK A. ROSSI,
Plaintiff,

v.

TROY STATE UNIVERSITY, *et al.*,
Defendants.

ORDER AND FINAL JUDGMENT

In accordance with the court's memorandum opinion entered on this day, it is hereby ORDERED as follows:

1. Defendants Troy State University and Jack Hawkins' Motion for Summary Judgment (Doc #10) is GRANTED.

2. Judgment is entered in favor of Troy State University and Jack Hawkins and against Patrick A. Rossi.

3. Costs are taxed against the Plaintiff.

DONE this 22nd day of July, 2002.

/s/ W. Harold Albritton
W. HAROLD ALBRITTON
CHIEF UNITED STATES DISTRICT JUDGE